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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. MARIO VERA GONZALEZ, Defendant and Appellant.	G040206 (Super. Ct. No. INF039323) O P I N I O N

Appeal from a judgment of the Superior Court of Riverside County, John J. Ryan, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Ronald A. Ziff and Abby Besser Klein for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Steve Oetting and Donald W. Ostertag, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

Defendant Mario Vera Gonzales argues there is insufficient evidence to sustain his conviction for first degree murder conviction in the death of Bernardo Gouthier. He also argues the sentence of 25 years to life was cruel and unusual punishment. We find no error and affirm.

I

FACTS

We present the facts in the light most favorable to the judgment in accord with established principles of appellate review. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.)

Kathy Barr was married to Pattison Hayton in 1992. Their marriage eventually grew troubled. In 1997, Hayton was arrested for spousal abuse. During divorce proceedings, Barr began a romantic relationship with Bernardo Gouthier. Hayton was displeased with the relationship, and at one point told Barr never to see Gouthier again.

Hayton paid a friend of his, Jerry Reynolds, $50,000 to arrange Gouthier's murder. Reynolds then hired Jesse Nava and Michael Marohn to carry out the murder. Nava and Marohn were paid $1,000 and $5,000, respectively.

On October 25, 1997, Nava and Marohn planned to go to Gouthier's house to carry out the murder. The only gun they had was a .357 handgun, but Nava was nervous about its size. Marohn had a friend, defendant, whom he knew had a smaller caliber handgun, and he told Marohn they could go to defendant's house and borrow the gun. The two went to defendant's house, and he came out to the front yard to speak to them. Marohn asked defendant if he could borrow the gun, and defendant said, "Yes." Defendant gave Marohn the gun, a loaded .25-caliber handgun. Marohn gave defendant the .357 as "collateral" for the smaller caliber gun.

Nava and Marohn did not tell defendant about the murder for hire plot. They told defendant that they were going to commit a robbery that included cocaine.[1] They invited defendant to come with them, and he agreed. Defendant was told there would be money and cocaine in it for him. Defendant's job, once they were in the house, was to find the cocaine.

The men drove over to Gauthier's house, discussing how they were going to commit the robbery. When they arrived, they put on latex gloves. They approached the house with Nava carrying the .25-caliber gun and defendant holding the .357. They entered the house and found Gouthier. After a struggle between Gouthier and Marohn, Nava shot Gouthier four times. Defendant was standing in the doorway of the room when the shooting occurred. The robbery did not take place because all three men fled immediately after the shooting. Gouthier's body was discovered later that night.

After defendant was arrested, he told the police that he knew Nava and Marohn intended to rob Gouthier. Defendant and three codefendants (Marohn, Nava and Reynolds) were charged with first degree murder. (Pen. Code, § 187, subd. (a).)[2] The information also alleged that defendant participated as a principal knowng that another principal was armed with a firearm (§ 12022, subd. (d)) and that defendant was personally armed with a firearm (§ 12022, subd. (a)(1)).

Defendant was tried separately, and at the conclusion of trial, he was found guilty of first degree murder, and that he was personally armed with a firearm. The jury found the principal armed allegation not true.

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[1] At trial, Marohn initially testified that he told defendant they were going to see a man who owed them money to collect from him, and "pick up some cocaine." This conflicted with earlier statements and subsequent testimony. Taken together, the evidence supports the conclusion that defendant knew they were going to commit a robbery.

[2] Subsequent statutory references are to the Penal Code.

At sentencing, the court struck the firearm enhancement and sentenced defendant to 25 years to life in prison. At sentencing, the court noted its belief that defendant had less culpability than the others involved in this crime: "I am recommending to the Department of Corrections that they seriously consider you for parole at the earliest date because you were hoodwinked by one [of] your buddies into what they knew was a murder, and that is unfair. Unfortunately, the law is against you. And your background and role in this case, your behavior in this courtroom from day one, it is just unlikely that you would be a danger to anybody in the public."

Defendant now appeals.

II

DISCUSSION

Sufficiency of the Evidence

Defendant argues, somewhat confusingly, that there was insufficient evidence to support his conviction for first degree murder. The argument is confusing because defendant's argument appears to be that there was insufficient evidence that he was an aider and abettor to the murder.[3] He then separately argues that the felony-murder rule is inapplicable to this case. Because he was convicted on a felony-murder theory, not as an aider and abettor, we address whether there was sufficient evidence to prove defendant's guilt under a felony-murder theory.

"'All murder . . . which is committed in the perpetration of, or attempt to perpetrate [certain enumerated felonies including robbery and burglary] . . . is murder of the first degree.' (Pen. Code, § 189.) The mental state required is simply the specific intent to commit the underlying felony [citation], since only those felonies that are

[3] The jury was given instructions as to aiding and abetting as to burglary and attempted robbery, and instructed that aiding and abetting was a predicate felony under the felony-murder rule.

inherently dangerous to life or pose a significant prospect of violence are enumerated in the statute. [Citations.] 'Once a person has embarked upon a course of conduct for one of the enumerated felonious purposes, he comes directly within a clear legislative warning—if a death results from his commission of that felony it will be first degree murder, regardless of the circumstances.' [Citation.]" (*People v. Cavitt* (2004) 33 Cal.4th 187, 197.)

The jury in this case was instructed with the elements of the felony-murder rule, as well as the predicate crimes of burglary, robbery, attempted robbery, and aiding and abetting as to burglary and attempted robbery.

The standard of review is whether, after reviewing the evidence in the light most favorable to the judgment, a rational fact finder could have concluded defendant was guilty beyond a reasonable doubt. (*People v. Rowland* (1992) 4 Cal.4th 238, 269.) "Reversal on this ground is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' [Citation.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.) Evidence is substantial when it is of ponderable legal significance, reasonable in nature, credible, and of solid value. (*People v. Ramsey* (1988) 203 Cal.App.3d 671, 682.)

The evidence here was more than sufficient—indeed, it was overwhelming. There was unrefuted testimony stating that defendant went to the victim's house along with Marohn and Nava with the intent to rob the victim. Defendant's own statement corroborates Marohn's testimony. Defendant's arguments to the contrary are simply specious and unsupported by the record. The murder, despite the fact that it was committed by a codefendant, was committed during the perpetration of attempted robbery and burglary, crimes enumerated in the felony-murder statute. Defendant is thus culpable for felony murder, and his guilt is supported by more than substantial evidence.

Defendant further claims that the felony-murder rule was applied "belatedly" because the prosecution had initially hoped to prove first degree murder against defendant on the theory that defendant knew Marohn and Nava intended to kill the victim. The court disagreed that sufficient evidence was present to support this theory, and noted that the information sufficiently pled felony murder. Defendant offers no citation to authority in support of his contention that this was improper. At trial, defense counsel made no objection to this instruction. The jury was properly instructed on the charge. We therefore find no error.

Defendant's one sentence argument that the court's "error" violated his rights to due process, trial by jury, jury confrontation, and the right to counsel, among others, are rejected as insufficiently argued. (*People v. Griffin* (2004) 33 Cal.4th 536, 589-590, fn. 25.)

Sentencing

Defendant next argues that sentencing him to 25 years to life in prison for felony murder was cruel and unusual punishment and in violation of the United States Constitution. "Whether a punishment is cruel or unusual is a question of law for the appellate court, but the underlying disputed facts must be viewed in the light most favorable to the judgment. [Citations.]" (*People v. Martinez* (1999) 76 Cal.App.4th 489, 496.) "Because it is the Legislature which determines the appropriate penalty for criminal offenses, defendant must overcome a 'considerable burden' in convincing us his sentence was disproportionate to his level of culpability. [Citation.]" (*People v. Weddle* (1991) 1 Cal.App.4th 1190, 1196-1197.)

"Because choosing the appropriate penalty is a legislative weighing function involving the seriousness of the crime and policy factors, the courts should not

intervene unless the prescribed punishment is out of proportion to the crime. [Citation.]" (*People v. Felix* (2003) 108 Cal.App.4th 994, 999-1000.) Thus, a mandatory punishment may not be imposed if "it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity." (*In re Lynch* (1972) 8 Cal.3d 410, 424, fn. omitted.)

We review the facts independently in the light most favorable to the judgment. (*People v. Martinez, supra,* 76 Cal.App.4th at p. 496.) Defendant, along with his coconspirators, broke into a house at night with the intent to steal cocaine. He and one of his coconspirators were armed, and the gun actually used to murder the victim was loaned by defendant to Nava. Even without the murder for hire conspiracy that was unknown to defendant, the potential for serious injury or death was substantial. Going to someone's home with the intent to rob them is a serious crime, and creates the danger that someone will be shot during the robbery. Given those facts, we do not find that the sentence given here shocks the conscience.

Further, defendant has not made the required showing, based on cases in California or other jurisdictions, that his sentence was disproportional. Indeed, he has made no comparative showing at all in his opening brief. In his reply brief, he compares this case to one other case, *Dillon*. One case alone does not create an inference of disproportionally. He also compares his sentence to that of Marohn, who testified pursuant to a plea agreement. Such a comparison is obviously inapposite, and we find no error.[4]

[4] We also reject, as belatedly raised, insufficiently argued, and not raised below, defendant's one-page argument in his reply brief arguing that the trial court could and/or should have dismissed the case pursuant to section 1385 subdivision (a).

III

DISPOSITION

The judgment is affirmed.

MOORE, J.

WE CONCUR:

SILLS, P. J.

O'LEARY, J.